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# "Deterring corruption and cartels: in search of a coherent approach"

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# DETERRING CORRUPTION AND CARTELS: IN SEARCH OF A COHERENT APPROACH

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## ABSTRACT

This article addresses how the rules intended to protect consumers and taxpayers from economic crime, namely leniency and cartel settlements in competition law, criminal sanctions and debarment of suppliers from participation in public tenders for bribery, work together. While the economic reasoning behind these rules makes sense when considering each one of them in isolation, their impact is weaken when they are opposing each other. Competition authorities are narrowly mandated to control competition, and they do not seek out corruption. For criminal law investigators problems are created if they interfere (because it would undermine the leniency program); conversely, there are problems if they stay away (because that would undermine enforcement of corruption and other economic crimes). We propose to strengthen the regulation of corporate misconduct through better collaboration and integration of the other law enforcement functions and institutions that exist. The first step is to maintain and share a centralized database on firms' offenses and settlements with anti-trust and procurement authorities. The second step is to expand the mandate and competence of competition authorities to search for, and react against, corruption.

## RESUME

Cet article étudie comment les jeux de la règlementation, des contrôles et des sanctions destinées à protéger les consommateurs et les contribuables contre les abus des entreprises, à savoir les programmes de clémences et de procédures négociées dans le cas de lutte contre les ententes, et les sanctions criminelles et d'exclusion des marchés publics dans le cas d'affaires de corruption, interagissent. Prises séparément ces différentes régulations et sanctions semblent adaptées au problème qu'elles visent à traiter. Mais appliquées ensembles elles peuvent avoir des effets indésirables car contradictoires. Les autorités de la concurrence se concentrent sur les problèmes de collusion et d'abus de position dominante. Pour mettre à jour les ententes elles utilisent des programmes de clémences. Or ces programmes rentrent en conflit avec l'obligation d'exclure des marchés publics une entreprise qui s'adonne à la corruption ou participe à des ententes. Pour remédier à cet écueil nous proposons, d'une part, de centraliser l'information concernant les divers abus des entreprises, et d'autre part, d'élargir les prérogatives des autorités de la concurrence pour protéger les acteurs particuliers, non seulement contre les ententes et autres pratiques considérées comme anticoncurrentielles, mais également contre les cas de corruption.

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## 1. INTRODUCTION

Since the 1990s, governments have approved and implemented radical tools for the sake of protecting markets from illegal business behaviour. International conventions on corruption made it impossible for firms to justify their bribery for contracts by pointing to a foreign business culture. Most jurisdictions can prosecute and sanction suppliers for the bribes they pay in foreign markets, expenses that suppliers previously deducted from their taxes. Across the globe, politicians proclaim zero-tolerance towards corruption, and at present, most countries have rules mandating that procurement agencies exclude corrupt suppliers from participating in tenders for public contracts. At the same time, competition authorities' enforcement against secret cartels has hardened, resulting in both all-time high fines and calls for increased use of imprisonment.[3] Likewise, most competition-law regimes have introduced leniency or amnesty programmes, and these have revolutionized the detection of secret cartels, in combination with settlement mechanisms that provide expedient sanctioning of the infringements.

Nevertheless, cases of corruption and various other forms of collusion continue to emerge, including for example the Petrobras/Lava Jato case in Brazil, the recently settled VimpelCom telecoms case involving corruption in Uzbekistan, and substantial fines imposed on players in the financial sectors, including HSBC Citigroup, Barclays and Deutsche Bank. International surveys of business representatives reveal a general perception that the challenges persist, while citizens in most countries have a diminishing, if not dismal trust in their governments' ability to tackle the problem. Why is this the case, given the impressive progress made towards a harmonized legal platform for action against corruption and cartels?

The desire to find an answer to this question motivated this article, which addresses how the aforementioned rules function in practice, and in particular, how they work together. What we find is that the governments, in their eagerness to incentivize self-reporting and keep the corrupt away from government contracting, largely ignored the question of the policy tools' co-existence. Most of the policy initiatives were inspired by experiences from the United States, where they have a different institutional landscape than what is commonly found, for example, in Europe and in its former

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[3] See for example the recent € 2.93 million fine imposed on truck manufacturers (http://europa.eu/rapid/press-release_IP-16-2582_en.htm), and Wouter Wils: Is Criminalization of EU Competition Law the Answer? *World Competition: Law and Economics Review*, Vol. 28, No. 2, June 2005.

colonies. In most European countries, there are different institutions mandated to control different types of crime. In the United States, however, crime committed by firms to secure profits can – to a much larger extent – be investigated and sanctioned by one and the same government unit – typically the Securities and Exchange Commission in close collaboration with the Department of Justice, often with all concerns addressed in an out-of-court settlement process.

Therefore, while the economic reasoning behind the radical reforms mentioned above makes sense to many experts (who typically consider each one of them in isolation), the impact of the reforms may have been weaker than expected, simply because policymakers have failed to consider the interaction between the different tools. This possibility is what the article will examine in the following sections. The article does not intend to provide a detailed analysis of the state of the law in the EU member States. It does, however, point at general dysfunctions in the enforcement system adopted by most Member States with regard to the interaction between competition law, public procurement law and criminal law. As well, it defines a scope of improvement of the interaction between enforcement authorities.

We begin with a brief presentation of the policy tools we have in mind: leniency and cartel settlements in competition law, criminal sanctions for bribery, debarment of suppliers from participation in public tenders, and eventually, private enforcement, such as private players' opportunity to claim compensation for breach of rules regulating market behaviour. For each of them, we will pinpoint some challenges in their function vis-à-vis the others. Next, we summarize insights across the different policy tools and present an argument for a more coherent approach to corruption and cartels – before we turn to a discussion of the implications for the institutional landscape. However, the complexity of challenges associated with the interaction between different institutions and policy tools requires more insights than those we currently have, and as we discuss reforms, we will try to pinpoint some areas where more research is needed. We end the article with our conclusions.

## 2. COMPETITION LAW

Over the past decade, European competition law has undergone a rapid development in particular in two fields: mechanisms for the detection of covert infringements (leniency in cartel cases) and the use of negotiated settlements (cartel settlements and commitment decisions). Taken together, these developments have considerably changed the landscape of competition law enforcement in Europe.

In considering competition law as such, we may truly call this development a success. Most cartel cases are detected because of leniency applications, and the high level of fines continues to increase the upside of applying for leniency.[4] Moreover, the cartel settlements procedure is currently applied in a majority of cartel cases, providing for more expedient prosecution.[5] The commitment procedure under Article 9 of Regulation No 1 is also regularly applied in cases where the promotion of competition is at issue.[6] This has facilitated tailor-made remedies that effectively remedy competitive

[4] See for example the recent truck manufacturer cartel, where the leniency applicant's fine was reduced from approximatively €1.2 billion to zero, while the other cartel members were fined a total of € 2.93 billion. See http://europa.eu/rapid/press-release_IP-16-2582_en.htm.

[5] The truck manufacturer's cartel was the 21th instance of cartel settlements since this option was introduced in 2008. On the settlement procedure, see Flavio Laino & Elina Laurinen: The EU Cartel Settlement Procedure: Current Status and Challenges, *Journal of European Competition Law & Practice* (2013) 4 302-311.

[6] The commitment procedure was introduced by Regulation No 1/2003 Article 9, which vested the Commission with power to close a case on the condition of commitments on future behaviour from the undertakings involved. Such commitments are made legally binding on the undertakings, but involves no admission of guilt or a finding of an infringement. See the account given by the Commission in its communication Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives, COM(2014) 453. For a critical perspective, see Georgiev: Contagious Efficiency: The growing Reliance on U.S.-Style Antitrust Settlements in EU Law, [2007] *Utah L. Rev.* 971, and Ehlermann/Marquis (eds.): Antitrust settlements under EC competition law, *European Competition Law Annual* 2008, Oxford 2010, with further references.

concerns and even promote increased future competition in the markets. The combination of an increased level of detection and more efficient remedies has clearly added to the success of European competition-law enforcement, evidencing the importance of incentive-based, ad hoc mechanisms framed in a coherent and consistent way according to the enforcement needs in a particular field of the law.[7]

If one considers the close connection between competition law infringements and other crimes, the picture does appear more nuanced, however.[8] First, when detection is considered, a successful competition-law leniency system may have an adverse impact on the detection of other crimes.[9] This is so because when corruption and collusion co-exist in a particular case, a leniency application under the competition rules will trigger secrecy obligations and focus the case on the competition law infringement.

To our knowledge, no European competition cases have led to prosecution for corruption. This suggests that competition-law regimes may induce competition authorities to disregard economic crimes other than competition-law infringements. Competition authorities in Europe are generally one-purpose agencies specialized in competition law, with no responsibility to prosecute or report other crimes. In addition, rules on secrecy and other limitations on the use of evidence (see for example Article 12.2 and 28 of Regulation No 1) prevent competition authorities from pursuing (or letting other authorities pursue) related crimes.

Considering prevention of future infringements, both commitment decisions as well as settlements have the potential for incentivizing compliance also beyond what is regulated by competition law, a function that, in theory at least, is similar to the principles of "self-cleaning" in public procurement law, considered below.

However, commitment decisions only address the competitive concerns and not the risk of future instances of corruption. The commitments typically accepted by the Commission are not aligned with the requirements for self-cleaning, with regard, for example, to establishing compliance programs and whistle-blowing procedures. As well, commitment decisions are normally not used in cases which may involve corruption. *Settlements* do not include prospective obligations at all.[10] Consequently, competition-law remedies do not ensure future compliance with criminal law standards of corruption and other white-collar crimes.

While innovative measures have been designed to deter cartels and ensure that remedies are tailored in order to promote effective competition in the future, there may have been adverse effects on the detection and prevention of corruption and other economic crimes. Competition authorities are narrowly mandated to control competition, and they will not seek out corruption. In fact, competition authorities are disinclined to investigate corruption. For criminal law investigators this situation resembles a Catch 22 puzzle; problems are created if the authorities interfere (because it would

[7] One may, however, question the internal coherence of the current detection mechanisms and remedies of European competition law. See for a discussion Erling Hjelmeng, Competition Law Remedies – Striving for Coherence or Finding New Ways, CMLRev. (2013) 1007- 1037. See further the Commission's report Ten Years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives COM (2014) 453.

[8] See Ariane Lambert-Mogliansky. Corruption and collusion: strategic complements in procurement. In S. Rose-Ackerman and T. Søreide (eds.) *International Handbook on the Economics of Corruption, Volume Two*. Edward Elgar Publishing (2011).

[9] Discussed in Tina Søreide, *Corruption and Criminal Justice: Bridging Economic and Legal Perspectives* (Edward Elgar Publishing. Cheltenham, UK, and Northampton, MA, 2016), pp 100-101.

[10] According to the Commission's website, "a settlement decision simply requires a 'cease and desist' of past behaviour, whereas commitments decision requires commitment to future behavior." (http://ec.europa.eu/competition/cartels/legislation/cartels_settlements/settlements_en.html).

undermine the leniency program); conversely, there are problems if they stay away (because that would undermine enforcement of corruption and other economic crimes).[11]

Eventually, although negotiated remedies are becoming increasingly important in European competition law, these are focused on competition law and the potential to combat other economic crimes is not reflected in its current use.

## 3. DEBARMENT IN PUBLIC PROCUREMENT

As a further approach to protecting markets against corruption and collusion and to securing trust in public institutions, governments have decided to exclude suppliers from taking part in tenders for public procurement contracts if they have been involved in corruption (in the public or private sector) and some other offences; hence, the firms are *debarred.*

The mandate for debarment was introduced in the EU Public Procurement Directive already in 2004 and later amended in the 2014 directive.[12] The directive of 2014 stipulates, as its predecessor, a combination of mandatory and facultative debarment. According to Article 57(1) and (3), "*Contracting authorities shall exclude an economic operator from participation in a procurement procedure where they have established, by verifying in accordance with Articles 59, 60 and 61, or are otherwise aware that that economic operator has been the subject of a conviction by final judgment for one of the following reasons: ... .*" The reasons then listed in the Article includes participation in a criminal organization, corruption, fraud, terrorist offences, money laundering or terrorist financing, and child labour. It should be noted that debarment is warranted even if the procurement agency is merely "otherwise aware" of such offences, which means that a supplier can be excluded on a strong suspicion of crime; a court verdict is not required. The US Government applies a similar rule and so do the largest development banks, including the World Bank.[13]

To what extent can we expect debarment to make a difference? By excluding illegitimate suppliers, governments hope to improve the level of integrity in markets for procurement contracts and deter crime in the longer run. At the same time, the more suppliers they keep out of markets, the more the rule harms competition. Will the benefits associated with debarment always weigh up against the costs?

Let us consider the debarment rule *ceteris paribus*, with a focus on how it works to deter corruption in a closed market with a significant risk that procurement agents are corrupt – a setting studied by

[11] Insufficient coordination across the law enforcement institutions can be a problem also in contexts where cartel collaboration is criminalized. While a competition authority investigates competition law crime and reports individuals involved in the case to the public prosecutor, the public prosecutor in turn may be blocked from relying on the evidence for pursuing other crimes.

[12] Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, OJ 2014 L 94/65. We have described the rules in more detail in Erling Johan Hjelmeng and Tina Søreide. *Debarment in Public Procurement: Rationales and Realization.* In (Eds) GM Racca and C. Yukins (2014:215-32).

[13] Regarding international organizations, see N. Seiler and J. Madir, *Fight against Corruption: Sanctions Regimes of Multilateral Development Banks*, in *Journal of International Economic Law*, 2012, 5-28; and P. H. Dubois – A. E. Nowlan, *Global administrative law and the legitimacy of sanctions regimes in international law*, in S. Rose-Ackerman & Carrington: *Anti-Corruption Policy: Can International Actors Play a Constructive Role?*, 2013, Carolina Academic Press, Durham NC, 201-214. Tina Søreide, Linda Gröning and Rasmus Wandall. An efficient anticorruption sanctions regime? The case of the World Bank. *The Chicago Journal of International Law* 16 (2): 523-552. For the collaboration between development banks, and how debarment by one leads to debarment by the others, see Frank Fariello and C.C Daly. Coordinating the Fight against Corruption among MDBS: The Past, Present, and Future of Sanctions. *George Washington International Law Review*, 45, 253 (2013).

Auriol and Søreide (2015).[14] If detected, the debarment rule implies exclusion of a supplier that has paid a bribe while the consequences for the procurement agent is kept constant (Article 57 says nothing about the procurement agents). A corrupt procurement agent directs contracts towards suppliers who have offered a bribe, opting for sole-source procurement instead of organizing a fair competitive tender.

For each supplier, the net benefit of offering a bribe at the risk of being detected, and then debarred, depends on the number of competitors as well as the perceived value of obtaining government contracts in the future. With many competitors, it is difficult for each one to secure a contract. Marginal revenues are very close to marginal costs, and the situation, should they be excluded, is not very different from being an eligible bidder; the private sector demand keeps them alive. When there is not much to gain from honest competition, the profits from securing a contract through bribery easily outweigh the risks.

In this scenario, one might imagine the rule – applied as stipulated by the Directive – eliminates the competitors one by one, while corrupt procurement agents can continue to take bribes. In fact, the fewer suppliers left in the market, the higher the bribes they can take, because each supplier has more revenues to share as a result of their stronger market position. This means, for the procurement agents, that corruption becomes increasingly more attractive. In contrast, for the firms that obtain more profits the more competitors the government excludes, the consequences of debarment begin to matter. Under the given assumptions, it is clear that debarment will not deter firms from bribery unless the competition is already constrained.

However, as follows from the most basic oligopoly theory, if competition is already constrained, one cannot exclude another competitor without harming the price-quality combination. With fewer suppliers, there is also a heightened risk of excluding a supplier that provides essential products or services with few if any substitutes. What is more, the fewer the number of suppliers remaining in the market, the easier it is for them to collude; they can operate a cartel.

To what extent can we expect debarment to deter cartel collaboration? What if cartel collaboration is added to the Article 57 reasons that justify debarment, as is the case already in World Bank procurement regulation? Would that ensure the debarment rule's preventive effects, including in cases of few bidders and a high risk of collusion? It is a possible option. There are few examples of development banks debarring suppliers found guilty in cartel collaboration, but in the Philippines in 2009, all the seven road construction companies involved in a bid-rigging scheme for World Bank-financed contracts were in fact debarred.[15] However, in most cases, the exclusion of all the suppliers from a public procurement market harms society too much and therefore is generally not advisable. Instead, the procurement agency could debar the ringleader or responsible directors.

The risk of facing a situation where all bidders have been involved in crime justifying debarment is in fact present also under the EU procurement directive. As Ariane Lambert points out, corruption facilitates cartels, and many cartels have survived because the suppliers had an insider on the side of the government procurement agency.[16] In cases where both offences have happened, the government should debar all the colluding suppliers because they all have been involved in corruption. The difficulty associated with such a situation was illustrated in Brazil following the grand *Lava Jato* corruption scandal. By law, the country's largest construction firms should be debarred from public contracting, while in practice, this proved difficult because their services were urgently needed. For

[14] Auriol, Emmanuelle, and Tina Søreide. An Economic Analysis of Debarment. *NHH Dept. of Business and Management Science Discussion Paper* 2015/23 (2015).

[15] World Bank press release, January 14, 2009. The Philippine government's immediate reaction to the case raised suspicions that corruption could be part of the scam, as the president's response, widely quoted in the press, was, "We can always find another development bank." Case mentioned also by E. Auriol and T. Søreide, supra note 14.

[16] A. Lambert-Mogiliansky. supra note 8.

the government, it was a choice between violating rules protecting markets from corruption (resulting in demonstrations against the government) and allocate contracts to the guilty firms for the sake of critically needed infrastructure (which, if not provided, would also lead to public outcry).

In this section, we have reviewed conceptual difficulties with the debarment rule. The mechanisms discussed are consistent with the more noisy circumstance of an open, international market for public procurement contracts. What matters for the potential deterrent impact on firms, is the extent to which they are dependent on public procurement contracts, that is, how important the next contract might be. The easier another firm replaces a debarred firm, the weaker the tool's effect on competition. If it has no impact in the market, and firms are not completely dependent on procurement contracts, it will have no impact on corruption.[17] One can always argue that the objective of the rule is to send a clear signal that integrity matters and thereby generate trust in governmental spending decisions. The value of that signal is highly uncertain, however, if the players' incentives remain unchanged, or – when the rule works as intended, it harms society by weakening competition or cutting important benefits.

## 4. DEBARMENT IN PRACTICE

Given the difficulties associated with debarment, it comes as no surprise that across Europe, the debarment rule is weakly enforced. There are several reasons why this is so. The following are three main concerns.[18]

First, it is not sufficiently clear how the rule is to operate, because the Procurement Directive does not provide for a full harmonisation. Principles of *equal treatment* in the national legal orders limit the governments' opportunity to make exemptions from the rule on an ad hoc basis, and in that respect, deviation from the rule simply because a supplier has too strong a grip on the market is questionable. As well, the principle of *proportionality* implies that governments should not treat firms more harshly than necessary for the intended effect, and as discussed, the determination of what is necessary is far from clear.[19]

This brings us to the second concern. The regulations are supposed to stipulate what it takes for suppliers to be re-accepted for public tenders. According to the EU Procurement Directive Article 57 (6) and (7), *"Any economic operator that is…<supposed to be debarred>… may provide evidence to the effect that measures taken by the economic operator are sufficient to demonstrate its reliability despite the existence of a relevant ground for exclusion. If such evidence is considered as sufficient, the economic operator concerned shall not be excluded from the procurement procedure."* The Article then instructs governments on how to assess, on a discretionary basis, whether a supplier has done what it takes to regain status as an eligible bidder, although governments must also determine the maximum period of exclusion from public tenders. A supplier found guilty in corruption will thus not necessarily have to take any steps to become trustworthy; the supplier can regain trust simply by waiting until the debarment period is over.

The third concern is that the rules are seemingly developed on the assumption that procurement agents are (always) honest. In practice, the procurement agents are the ones who determine whether a supplier is eligible for participation in a tender. They decide whether suspicion of criminal activity should lead to exclusion, whether a firm has done what it takes to become trustworthy – such as dismissing a member of management, introducing a whistle-blowing regime, or simply stayed out in the cold for a sufficiently long time. If these rules are motivated by the risk of corruption in public procurement,

[17] For more explanation and analysis, see E. Auriol and T. Søreide (2015), supra note 14.
[18] Several of the following arguments were discussed also by Erling Johan Hjelmeng and Tina Søreide, see supra note 12.
[19] Previously discussed by E. Hjelmeng and T. Søreide, supra note 12.

why are procurement agents given such large leeway for discretion? Alas, in many contexts, the very same rules forbid procurement agents from assessing a bid based on the bidders' past performance.[20]

A further important reason why debarment is difficult to enforce is the fact that procurement agents do not have a specific registry of criminal suppliers. Unless procurement agents run a background check on bidders, debarment depends on information from the suppliers themselves or from competitors who are aware of the facts. In many cases, it is even difficult to determine what members in a group are parts of the same company. While it may be clear that one country office of a large international company is guilty in bribery, it is less clear whether all the branches of the company and subsidiaries should be excluded as well. Very large suppliers are simply too important to be excluded, and in such cases, the matter might be settled with the firm making an extra payment (such as Siemens $100 million to the World Bank) or take some other step that implies a cost while the firm's supply continues.[21]

Despite the many challenges, policymakers keep referring to debarment as a powerful policy instrument against corruption.[22] While it sounds like a good idea to exclude dishonest suppliers, debarment works poorly in practice, partly because it has not been well designed, and partly because it is not well administered and coordinated with other tools intended to protect markets.

## 5. CRIMINAL LAW

At the turn of the new millennium, several ratification processes pertaining to important international conventions on corruption were initiated and signalled a new era of regulation for business integrity. Across the globe, most countries reformed their laws on corruption, a process that resulted in rapid criminalization of corruption and held the promise of rule harmonization.[23]

The impact of the criminal law reforms are far from clear. While an overwhelming number of business climate estimates and governance indicators exist, none of these provide exact data on the extent of corruption, and while many of them correlate strongly, there are no strong reasons to conclude that we are about to rid ourselves of the problem.[24] Following the reforms, there was an upsurge of business conferences addressing risks of corruption (and how firms avoid criminal liability), and it might have influenced some leaders' moral compass and choices. While few business leaders seemed to care twenty years ago, todays' leaders are informed about relevant rules and risks, including the responsibility they have to keep their organization on the right side of the law.

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[20] For discussion, see S.D. Gordon and R. O. Duvall. United States: It's time to rethink the suspension and debarment process. Holland & Knight 3 July (2013) and J. Crawford. How Proposed Debarment Became Equal To Suspension. *Law 360* on 2 February 2015, see http://www.law360.com/articles/616957/how-proposed-debarment-became-equal-to-suspension

[21] See Jessica Tillipman. A House of Cards Falls: Why 'Too Big to Debar' is All Slogan and Little Substance. *Fordham Law Review Res Gestae* 80.49 (2012).

[22] The United Nations Office on Drugs and Crime, for example, states that "as anti-corruption initiatives around the world gain momentum, one device for fighting corruption -- debarment, or blacklisting, of corrupt or unqualified contractors and individuals has emerged as an especially noteworthy tool." The same report maintains "suspension or debarment from public contracts has proven to be an effective tool in the fight against corruption" (UNODC 2013: 25) UNODC. *Guidebook on anti-corruption in public procurement and the management of public finances*. Vienna: United Nations Office on Drugs and Crime.

[23] European governments criminalized corruption through their coordinated approval of the Council of Europe Criminal Law (2002) and Civil Law (2003) Conventions on Corruption. In parallel with that process in Europe, governments from all regions were persuaded to approve the United Nations Convention against Corruption (UNCAC) in 2003. In addition, the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, which entered into force in 1999, gave governments the legal basis for reacting against corporations that pay bribes in foreign markets.

[24] For sources on the perceived extent of corruption, see chapter 2 in T. Søreide, supra note 9. For a review of consequences, see OECD. 2015. *Consequences of Corruption at the Sector Level and Implications for Economic Growth and Development*. Paris: OECD Publishing.

Some countries, for example France, have extended the scope of their provisions under criminal law, which includes a specific provision criminalising breaches of public procurement rules, known as 'délit de favoritisme'. The crime of "favouritism" implies for example that representatives of the public purchaser may be prosecuted for granting benefits to particular tenderers.[25] Based on the jurisprudence, a breach of public procurement rules that cannot be qualified as corruption may still be punished as a 'délit de favoritisme'.[26] We do not, however, believe that the introduction of new crimes at the substantive level may remedy the general lack of coordination at the level of sanctions.

In practice, those responsible for enforcing criminal law against business corruption face substantial challenges.[27] Many prosecutors are constrained by limited resources and competence to take on complex cases of business-related financial crime. Political support for criminal law enforcement in corruption cases varies substantially across Europe and in most, if not all, countries, there are examples of serious law enforcement failure, especially in foreign bribery cases.[28]

Prosecutors that lack the resources and the mandate to operate independently, high levels of proof regarding evidence, numerous grey zone forms of bribery and the international character of markets – with numerous ways of hiding ownership and legitimizing transactions– are factors that make it easy for business leaders to benefit from corruption without much risk of detection. Even in the cases when a company evidently has profited from bribery, it is far from certain that any employee will be subject to a criminal sanction. Investigators rarely manage to document a bribe, and even though the managers in command may have been negligent, prosecutors cannot necessarily prove the extent of gross negligence needed to impose criminal sanctions. Typically, the evidentiary requirements under criminal law far exceed what evidence investigators can possibly provide in these kind of cases.

This leads us to the growing trend among criminal justice systems to "incentivize" firms to report their own crime, inspired by the kind of plea-bargaining that is much applied in the United States.[29] Through self-reporting, collaboration, and corporate leaders' commitments to never again commit such a crime, firms – increasingly – are given the opportunity to bargain down their charge and sentence, as well as other aspects, such as how much information to share with the public.[30] Across countries, the exact rules – if any official guidelines regulating such bargains exist at all – go in all directions, and apart from in the United States, they are far from predictably enforced.

While these settlements are steps in the direction of a system with compliance-based defence often seen as compatible with economic theory on optimal deterrence, they are not well aligned with the principles behind debarment rules in public procurement.

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See Article 432-14 of the French Code Pénal. The crime of "favouritism" and its relationship with competition law and the crime of corruption is discussed in the French contribution to the 2014 OECD Roundtable Fighting Corruption and Promoting Competition, see DAF/COMP/GF/WD(2014)52 (http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/GF/WD(2014)52&docLanguage=En).

[26] The SCPC (Service Central de Prévention de la Corruption) noted that between 2007 and 2010, no one served a prison sentence on the basis of this provision; there were 25 convictions that resulted in a suspended prison sentence and 20 cases in which fines were applied. The fines ranged from EUR 2 333 to 5 333 (see the EU Anti-Corruption Report, annex 10 France). http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/organized-crime-and-human-trafficking/corruption/anti-corruption-report/docs/2014_acr_france_chapter_en.pdf

[27] For a summary of enforcement challenges, see Erling Hjelmeng and Tina Søreide: Bribes, Crimes and Law Enforcement, University of Oslo Faculty of Law Legal Studies Research Paper Series No. 2016-07 (http://ssrn.com/abstract=2742770), forthcoming in *European Business Law Review*.

[28] The OECD evaluates country performance when it comes to the enforcement of their foreign bribery legislation. For a systematic review of law enforcement obstacles, see Søreide (2016), *supra note 9*, chapter 3.

[29] Other names for similar arrangements with corporations are *compliance-based defense*, *negotiated settlements*, *duty-based liability regimes*, and *negotiated* or *deferred prosecution agreements* (N/DPAs).

[30] For a study of eight European jurisdictions' rules and practices regarding such bargains, see Abiola O. Makinwa, (Ed) *Negotiated Settlements for Corruption Offences: A European Perspective*. The Hague: Eleven Publishing.

The lack of a strategy for co-existence affects both functions. With no other instructions, criminal law enforcers will easily consider debarment in public procurement as so direct a consequence of a criminal sanction that they will reduce the criminal sanction accordingly, or be persuaded to do so in the negotiations with the offender for a settlement. In a Norwegian supreme court case brought against the firm Norconsult, the court even included the risk of debarment from public procurement (and the damage this would cause the company) as one of few weighty factors opposing corporate criminal liability in a case involving bribery in Tanzania; the case resulted in individual liability only.[31]

In terms of debarment, the impact is clearly watered down if procurement agents refer to negotiated settlements under criminal law as evidence of a corrupt suppliers' successful 'self-cleaning'. As the use of such settlements increase, the entire debarment tool will be set out of function. It becomes a theoretical concept with no practical application, which is what our quick review of enforcement problems seems to suggest has already happened.[32]

## 6. TORT LAW/ CLAIMS FOR COMPENSATION

Under both competition law and in the context of corruption, calls have been made for more private enforcement, as well as several legislative initiatives.[33] Private enforcement in this context refers to compensating victims (typically customers having paid a supra-competitive price when purchasing goods or services from cartel members), in the form of the payment of damages. In addition to compensating victims, the involvement of private parties may supplement public enforcement; first, because private parties claiming to be injured may release valuable information to the authorities; second, because private action serves to terminate infringements; and finally, because private damages suits may constitute an important deterrent factor.[34]

The interaction between public and private enforcement, and especially the borderline between competition-law infringements and corruption, have been explored to a very limited extent. For example, promotion of more private enforcement in European competition law is focused on the protection of customers, facilitating follow-on suits in the aftermath of competition authorities' detection of secret cartels. However, as pointed out above, customers may not be as innocent as they would like to appear, and if they have been involved in corruption but have not been detected, this poses a challenge to the very idea of follow-on suits. Certain customers and their employees may certainly benefit from corrupt practices among their suppliers, e.g. in the form of kickbacks, advantages over other customers etc. Moreover, the ultimate consumer or citizen, who will often bear the final burden, is not compensated at all.

Further, the need to fine-tune and coordinate the public remedies becomes even more complicated when considering private enforcement. In competition law, it is well known that liability in tort may adversely affect incentive mechanisms designed to promote reporting (as reporting may expose the undertakings to damages claims).[35]

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[31] HR-2013-1394-A, case no. 2012/2114), Norconsult: http://www.domstol.no/en/Enkelt-domstol/-Norges-Hoyesterett/Summary-of-Recent-Supreme-Court-Decisions/Summary-of-Supreme-Court-Decisions-2013/

[32] Among the 427 cases of criminal law reaction against foreign bribery that took place in the period 1999 to 2014, according to the OECD, only two cases resulted in some form of debarment from public procurement. OECD. *OECD Foreign Bribery Report: An Analysis of the Crime of Bribery of Foreign Public Officials*. Paris: OECD Publishing (2014).

[33] Council of Europe Civil Law Conventions on Corruption (2003) and Directive 2014/104/EU on antitrust damages actions ([2016] OJ L 349/1). See further Wouter Wils: *The Optimal Enforcement of EC Antitrust Law: Essays in Law and Economics*, Kluwer Law, 2002, Chapter 8.

[34] See for an account of the function of different legal remedies Erling Hjelmeng and Tina Søreide: Bribes, Crimes and Law Enforcement, University of Oslo Faculty of Law Legal Studies Research Paper Series No. 2016-07 (http://ssrn.com/abstract=2742770), forthcoming in *European Business Law Review*, Table 4 and accompanying text.

[35] A similar effect may follow from debarment rules: if a successful leniency application exposes the undertaking to debarment; see this paper's Section 2 on competition law.

This calls for a more systematic approach to private enforcement, where the legal rules should promote compensation of the ultimate victims, while at the same time avoiding adverse effects on public enforcement. The shielding of successful leniency applicants from joint and several liability under the competition law damages directive (Article 11.4) may be seen as such step (although in the view of these authors this does not go far enough – successful leniency applicants should have been shielded from any liability). As well, the directive's presumption of cartel damages and passing-on (Articles 14 and 17) promotes compensation. Similarly, Article 57 (6) of the EU's Public Procurement Directive (2014/24/EU) provides an example of how public enforcement mechanisms may promote compensation to victims, as successful self-cleaning is made conditional upon the payment of compensation. In light of the challenges posed by the application of traditional tort law, compensation should arguably be better integrated into public enforcement.[36]

The mechanisms in the EU directives briefly described above, however, amount only to small steps in the forging of a consistent regime ensuring compensation while at the same time securing desistance and promoting deterrence. The first step is to consider the compensatory function across the dividing line between competition law and debarment for corruption in public procurement.

## 7. THE NEED FOR A MORE COHERENT APPROACH

When one takes into account each of the aforementioned law enforcement tools and how each typically functions in European countries, it becomes evident that they are not the result of one coherent enforcement arsenal. With the lack of a coherent understanding of how the tools work together, their impact easily becomes arbitrary, and we have explained how none of the policy tools considered seem particularly well adapted for co-existence with the others.[37]

There is also a mismatch between the purpose of laws and their expected function, especially because governments define and regulate corruption in criminal law. This set of rules was developed for the regulation of crime committed by (guilty) individuals, and as discussed, there are obvious shortcomings in criminal law regulation vis-à-vis corporations – including the strong presumption of innocence. At the same time, there is significant hesitation in criminal justice systems to depart from fundamental criminal justice principles, and hence a certain resistance to modifications that make the law more applicable for corporate misconduct. For example, in many countries, the introduction of leniency mechanisms known from competition law is far from straightforward. However, removing corruption and corporate misconduct from criminal law regulation is not necessarily a good solution. It would be seen as a step back from the impressive anticorruption reform process around the turn of the millennium and would signal a lower degree of seriousness associated with the offences, weakening the tools available for investigation.

A more sensible solution is to strengthen the regulation of corporate misconduct through better collaboration and integration of the other law enforcement functions and institutions that exist.[38] Governments need to make sure that the different tools work together, in the same direction, instead of opposing each other. As a minimum, the different law enforcement institutions need to consider

[36] It should be noted that the European Commission over several years have tried to promote private enforcement of the competition rules, see e,g, http://ec.europa.eu/competition/antitrust/actionsdamages/index.html. Guidelines have also been issued at the national level, see e.g. the guidelines issues by the French Ministry of Economic Affairs: http://www.economie.gouv.fr/dgccrf/L-action-civile-en-reparation-des-pratiques-antico.

[37] Following a Roundtable on Collusion and Corruption in Public Procurement, the OECD concluded already in 2010 with a need for closer collaboration between enforcement agencies, precisely because the offences occur in tandem. See OECD DAF/COMP/GF(2010)6 page 11: “Co-operation between the various national enforcement strategies with jurisdiction of collusion and corruption in public procurement is paramount, in order to achieve a coherent overall strategy and ensure its full implementation, and additionally, to facilitate efficient prosecution of these offences” ().

[38] On this point, mention should be made of the French Commercial Code Article 463-5, which provides for exchange of information between public prosecutor and the competition authority, on request of the latter.

various possible reactions following detected corporate misconduct, and align their own reactions in a planned, principled and strategic manner. It would help if governments would maintain and share with one other a centralized database on firms' offenses and settlements with anti-trust and procurement authorities. Collecting information at a central level would strengthen the coordination process among the different agencies and policies.

In our opinion, however, this will not be sufficient to ensure efficient protection of markets against corporate misconduct. In addition, we think it is necessary to expand the mandate and competence of competition authorities. Despite the obvious fact that corruption threatens competition, these institutions have – at present – no mandate to search for, or react against, corruption.

Corporate crime, conducted for the sake of securing corporate profits, needs regulation that implies a very close collaboration between competition control and criminal law enforcement. As a result, competition authorities should not need to worry about the consequences for the leniency mechanism if a case also involves corruption. The assessment of whether a firm is eligible to submit public (and private?) tenders, should be conducted as a one holistic reaction following reported or otherwise detected corporate misconduct. Consequently, criminal law enforcers should not need to worry about the additional consequences of a criminal sanction for public procurement markets. Procurement agents could concentrate on value for money and price-quality combinations, not the moral character of those behind the firms bidding for a contract, and they could choose suppliers from the pool of suppliers not listed in an (accessible) registry of debarred suppliers.[39] Accordingly, the decision to exclude a supplier should not be up to the procurement agents, but instead, follow the settlement process under the responsibility of a combined unit of enforcers whose main mandate would be to protect markets and fair competition against all forms of relevant threats.

What we propose is to strengthen an existing institutional structure and the one that holds the most relevant competence. Competition authorities are already used to considering policy choices and reactions against corporate misconduct with a view to the trade-offs between market consequences and other policy aims, such as crime deterrence. Considering the function of markets, the impact of debarment would resemble the impact of a merger – a frequent matter of analysis for competition authorities; in certain settings, the costs to society will exceed the expected benefits. Such considerations will not imply a soft stand against corruption involving the most powerful corporations. What it could lead to, however, is more emphasis on other reactions than debarment from public tenders, including for example a criminal law process against managers involved in the corporate misconduct (which would need to be addressed by the criminal justice system), more external monitoring of the corporation, or high fines which would harm owners more than markets. The idea of a merged law enforcement function would result in a regulation of corporate misconduct with more emphasis on the function of markets. The arrangement, which is not very different from the organization of law enforcement functions in the United States, would be ideal for considering all necessary aspects of a settlement process with corporate offenders. Ideally, the suggested arrangement should work at the international level, at least if it would have the function assumed in this discussion.

In the necessary reform process and the establishment of an agency with extended prerogative, it would be important to consider all aspects of its new mandate in light of the observed measures of its performance. While the number of cases processed is an easily available performance indicator, there are other aims, such as the deterrent effect on market players and justice in the law enforcement process, that are harder to monitor. However, with a certain emphasis on the institutional checks and balances and protection of accused offenders' opportunity to appeal in the court system, concentration of authority should not need to reduce governance legitimacy. One particular concern is associated with the extra authority associated with the self-cleaning requirements in public procurement and

[39] Similar to the World Bank arrangement, see World Bank. *The World Bank Office of Suspension and Debarment: Report on Functions, Data and Lessons Learned* (2015).

negotiated settlements under both competition law and criminal law. In practice, these arrangements are associated with vast discretion placed in one institutional unit, typically prosecutors or investigators who can stipulate what corporations should do to regain their status as trustworthy. The impact of using settlement processes would not necessarily be weaker if followed by some integrity control or guided by strict instructions.[40]

A further requirement for succeeding with such an arrangement is funding. Corporate misconduct happens in advanced forms, using the newest forms of technology, while exploiting legal loopholes faster than it takes to mend/close them. Law enforcement agencies need the same level of competence and technology – and they need resources. Although governments voice the need for efficient enforcement, institutional reform of the sort we have suggested would be at high risk of being underfunded.

There are many reasons why governments fail to give law enforcers the teeth they need, and the wish to keep space for some market distortions is one of them. Politicians may want to keep such space for the sake of favouring domestic industry and promoting domestic employment, but there are also less legitimate reasons, such as lobbyism, revolving door issues, corruption, and various forms of power hunts. Political independence combined with the necessary resources would be an essential condition for reform.

## 8. CONCLUSION

In this paper we have discussed how the lack of coordination between different public agencies that aim to protect citizens, consumers and tax payers from corporate misconduct lead to, at best, uncoordinated and inefficient enforcement of regulations, and at worse, counterproductive/conflicting actions that hamper the impact of law enforcement reactions and reduce trust in government institutions.

Law enforcement mechanisms have to function predictably to have a clear deterrent effect. To make a difference, they need to improve players' incentives for compliance and strengthen citizens' trust in government.

We have pointed out the need for institutional reform, with substantial emphasis on the protection of markets and more functional enforcement of regulations against corruption.

Although we have also pinpointed serious risks associated with concentration of authority, we are convinced that across Europe, the risks associated with maintaining the status quo regulations are higher.

[40] For a relevant discussion of the fundamental principle of separating the three functions of writing rules, investigating infringements, and evaluating the evidence and making a final judgment, introduced for the protection of firms and citizens against the government, see Jennifer Arlen. Prosecuting Beyond the Rule of Law: Corporate Mandates Imposed Through Deferred Prosecution Agreements. *The Journal of Legal Analysis*, NYU School of Law Public Law Research Paper No. 16-13. (2016).